UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.,	:	**CASE NO. 1:01cv00528**
	:	**(J. Spiegel, Mag. J. Sherman)**
Plaintiffs	:	
	:	
vs.	:	
	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,	:	
	:	
Defendants	:	

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, CARL L. PARROTT, JR., M.D.

Comes now defendant, Carl L. Parrott, Jr., M.D., in his individual and official capacities, and moves this Court for summary judgment in his favor on all issues in accordance with Rule 56 of the Federal Rules of Civil Procedure for the reason that no genuine issues of material fact exist for trial and this moving defendant is entitled to judgment in his favor as a matter of law. This Motion is supported by the attached Memorandum, federal law, the deposition of Jonathan Tobias, and all materials filed by any other party.

s/Lawrence E. Barbiere
Lawrence E. Barbiere
Ohio Bar Number: 0027106
Attorney for Defendant, Carl L. Parrott, Jr., M.D.
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
11935 Mason Road, Suite 110
Cincinnati, OH 45249
(513) 583-4200
(513) 583-4203 (fax)
Email: lbarbiere@schroederlaw.com

OF COUNSEL:

Michael E. Maundrell
Ohio Bar Number: 0027110
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
11935 Mason Road, Suite 110
Cincinnati, OH 45249
(513) 583-4200

MEMORANDUM

I. INTRODUCTION.

Plaintiffs in this action have filed a Second Amended Complaint against numerous defendants including Carl L. Parrott, Jr., M.D., individually and in his capacity as Hamilton County Coroner. The Second Amended Complaint alleges damages resulting from photographs taken of the body of Perry Melton, deceased, "for commercial purposes while his body was in the care, custody and control of the Hamilton County Coroner, all without due process of law and in violation of the equal protection provided by law." In addition, the Second Amended Complaint asserted state common law tort claims against all defendants. This Court has dismissed the pendent state common law tort claims and plaintiffs have re-filed those claims in state court.[1] As a result, the only claims pending before this Court are plaintiffs' federal constitutional claims.

It is unclear from the Complaint precisely what constitutional violations plaintiffs are asserting. However, it appears plaintiffs are claiming due process violations under the Fifth and Fourteenth Amendments as well as violations of equal protection pursuant to those same amendments. In addition, plaintiffs appear to be alleging a violation of the right to privacy.

Defendant, Carl L. Parrott, Jr., M.D., moves for summary judgment with respect to all claims in the Second Amended Complaint in all capacities in which he has been sued. First, the undisputed facts of record establish that he committed no constitutional violations. Second, Dr. Parrott is entitled to qualified immunity with respect to plaintiffs' federal claims.

II. FACTS.

Count One of plaintiffs' Complaint alleges that Perry Melton was killed while in the course and scope of his employment with Speciality Transportation Services, Inc. on or about

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[1] A copy of the state court Complaint is attached as Exhibit "A".

November 9, 2000. The Complaint alleges that following his death, Melton was taken to the Hamilton County Morgue. In paragraph 32 of the Second Amended Complaint, plaintiffs allege that Defendant Parrott:

a. Improperly granted defendant Condon access to the body of Perry Melton and/or the official file, including but not limited to, photographs of the decedent, Perry Melton;
b. Violated the privacy of Perry Melton's next of kin by providing photographs of the decedent and/or permitting defendant Condon to touch and/or manipulate and/or pose and/or photograph the body of Perry Melton;
c. Failed to maintain proper records of those persons authorized to enter and remain about the premises of the Hamilton County Morgue;
d. Failed to maintain control and possession of the Hamilton County Morgue property and records including, but not limited to, photographs of the decedent;
e. Failed to maintain proper security of the Hamilton County Morgue and its official files;
f. Improperly disclosed non-public medical information about the decedent without proper authorization;
g. Abused the corpse of the decedent;
h. Aided and abetted in the abuse of the corpse of the decedent;
i. Authorized and/or ratified and/or participated in the acts and/or omissions of defendant Pfalzgraf and/or defendant Tobias and/or defendant Condon and/or defendant John Doe;
j. Failed to obtain the consent of the surviving next of kin for the acts and/or omissions of defendants.

Jonathan Tobias began a fellowship with the Hamilton County Coroner's Office July 1, 2000. (Tobias dep., p. 423-424).[2] Dr. Robert Pfalzgraf, a pathologist and an assistant to the coroner was in charge of the fellowship program and supervised Tobias. (Tobias dep., p. 424-425). During the first several weeks of his fellowship, Tobias assisted on autopsies. Once he became more familiar with his job responsibilities, Tobias began doing autopsies under the supervision of the pathologist. Eventually, Tobias was permitted to do autopsies by himself although there was always another pathologist in the building or on call when he was performing an autopsy by himself. (Tobias dep., p. 426-427).

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[2] References to the Tobias deposition are to the deposition of Tobias taken in the **Chesher** case. Pertinent pages of that deposition are attached as Exhibits "B" and "C" and the entire deposition has been filed with the Court. (The parties in this case stipulated that depositions taken in the **Chesher** case could be used in this case as well.)

During his fellowship, Dr. Tobias worked at the morgue approximately 50 hours per week. He was also on call on some weekends and evenings. (Tobias dep., p. 429). Dr. Tobias first went to a death scene as part of his job responsibilities with the Coroner's Office in July, 2000. On that occasion, he was accompanied by investigators who assisted him in performing the necessary responsibilities. (Tobias dep., p. 33-34). By September, 2000, Dr. Tobias was given discretion with respect to crime scene investigations. (Tobias dep., p. 38).

The first time Dr. Tobias met Thomas Condon was at the morgue August 16, 2000. (Tobias dep., p. 97). Dr. Tobias did not see Thomas Condon at the morgue between August 16, 2000, and November 10, 2000. (Tobias dep., p. 100-101).

Dr. Tobias took a photograph of the body of Perry Melton at the Hamilton County Morgue approximately 6:30 to 7:00 p.m. on November 9, 2000, in the normal course of his job duties. (Tobias dep., p. 107; Tobias Affidavit, Exhibit 3 to deposition, par. 7). Earlier that day, Tobias had learned he would be doing the autopsy of Mr. Melton on November 10th. He did not go to the death scene to investigate, and when the body was brought to the morgue, Tobias used the last exposure on his camera to take a single photograph. (Tobias dep., p. 108). It was Tobias' intention that if the prints from the single negative were of sufficient quality he would put one photograph in the Coroner's Office file with respect to Mr. Melton and keep one photograph for his teaching file. (Tobias dep., p. 117).

Condon was not at the morgue when the photograph was taken on November 9, 2000. (Tobias dep., p. 119). Tobias developed the film into a negative at his home. He then took the negative of the photograph to Condon's studio in December in order to develop that negative and others he had taken with relation to his work. He did not complete the developing process, and left the partially developed prints at Condon's studio. Apparently, Condon still had test prints of the negative of Melton's body in his photography lab when the police searched his studio. (Tobias dep., p. 115-116). All photographs which were taken of Mr. Melton's body were taken in the ordinary course of business of the Coroner's Office and to the best of Dr. Tobias' knowledge, Thomas Condon never came into contact with or viewed the body of Perry Melton while it was in the morgue. (Tobias Affidavit, par. 7 and 8). Neither the negative nor the photograph was published by any representative of the Coroner's Office and Tobias did not authorize Condon to use the photographs for any purpose and no evidence exists that Condon made any use of or even saw the photograph.

III. ARGUMENT OF LAW.

A. PLAINTIFFS' FEDERAL CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

1. Plaintiff's Due Process Rights Were Not Violated.

This defendant is entitled to summary judgment on the due process claim as a matter of law whether the claim is for an alleged violation of substantive due process or procedural due process.

a. Substantive Due Process.

In **DeShaney v. Winnebago County of Dep't of Soc. Servs., 489 U.S. 189, 195 (1989)**, the United States Supreme Court held:

> ... nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself

> to deprive individuals of life, liberty or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

In **Culberson v. Village of Blanchester**, **125 F. Supp. 2d 252 (S.D. Ohio 2000)**, this Court cited to the Court's holding in **DeShaney** to find that an affirmative duty to protect arises only where the State has affirmatively acted to restrain the individual's freedom to act on his own behalf. It is this restraint, and not the failure to protect that triggers the Due Process Clause**. 125 F.Supp.2d at 268.** This Court further ruled that a claim for substantive due process arises when the conduct complained of violates personal privacy and bodily security in a manner which shocks the conscience. **125 F. Supp. 2d at 270-271.** As there are no allegations that Dr. Parrott affirmatively acted in a brutal or demeaning way so as to shock the conscience or to prevent plaintiffs from acting on their own behalf to protect themselves, the allegations of Plaintiffs' Second Amended Complaint do not support a substantive due process claim.

Plaintiffs' substantive due process claim fails under the "shocks the conscience" test. In **Reed v. Knox County Dept. of Human Services**, **968 F.Supp. 1212, 1216 (S.D. Ohio, E.D. 1997)**, the court cited to **DeShaney, supra**, for the observation that "the Due Process Clause of the Fourteenth Amendment 'does not transform every tort committed by a state actor into a constitutional violation.'" In **Reed**, the court considered the §1983 claim of foster parents that the state defendants' failure to provide them with information concerning the violent tendencies of their foster children constituted a violation of plaintiffs' due process rights. The court rejected the plaintiffs' claim holding:

> In this case, even assuming that the defendants knew about the information in the records submitted by plaintiffs but failed to provide this information to plaintiffs when they permitted the foster children to be placed in plaintiffs' home, the failure to provide information, in itself, does not provide plaintiffs with a basis for a §1983 claim. *Hiser* indicates that *DeShaney* would bar plaintiff's claim for the

> failure to provide information where the plaintiffs seek compensation for damages resulting from injuries caused by the foster children, who are private actors, and where no evidence has been offered that the defendants' conduct went beyond mere omissions and affirmatively limited plaintiffs' ability to protect themselves.

Id. at 1220. In this case, there is no evidence that Defendants "affirmatively limited plaintiffs' ability to protect themselves."

"The Sixth Circuit has described substantive due process as 'the right to be free from state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience' of a court." **Barrett v. Outlet Broadcasting, Inc., 22 F.Supp.2d 726, 744 (S.D. Ohio, E.D. 1997),** citing, **Lillard v. Shelby Cty. Bd. Of Educ., 76 F.3d 716, 725 (6th Cir. 1996).** In **Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000),** the court considered bodily injury received during a gun battle with police officers. In **Barrett, supra**, the court considered claims against media representatives that they had moved and photographed the body of a suicide victim. Finally, in **County of Sacramento v. Lewis, 523 U.S. 833 (1998),** the Supreme Court considered the death of a passenger on a motorcycle involved in a police chase. The claims of Plaintiffs in the case at bar do not involve claims of such invasion of bodily integrity, therefore, pursuant to settled law, Plaintiffs' fail to state a claim for a violation of their substantive due process rights based on conduct of the Defendants that "shocks the conscience."

In fact, the only conduct in the case at bar which plaintiffs appear to question was taking the negative to an outside studio to develop. The photograph was legitimately taken by a pathologist in the Coroner's Office for a business purpose. The body was not touched or manipulated and no defendant published the photograph. The photograph was a public record to be placed into Mr. Melton's file. No commercial or other use was made of the photograph. No conduct occurred in this case which approaches the egregious nature of conduct necessary to meet the shocks the conscience standard.

In **County of Sacramento**, the Supreme Court specifically noted its reluctance to expand the concept of substantive due process. **523 U.S. at 842.** The Court further held that "the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States,' ...." **Id. at 848.** As with their allegations of a deprivation of their equal protection rights and the denial of their right to privacy, Plaintiffs fail to state a claim for a violation of their substantive due process rights.

b. Procedural Due Process.

In order to state a valid procedural due process claim, a plaintiff must show a deprivation of life, liberty, or property under color of state law. **Brotherton v. Cleveland, 923 F.2d 477, 479 (6th Cir. 1991).** A plaintiff must also show: (1) the conduct was caused by an "established state procedure rather than random and unauthorized action"; or (2) the means of redress for property deprivations provided by the State of Ohio fails to satisfy the requirements of procedural due process.

In the case at bar, plaintiffs have not been deprived of any life, liberty or property interest. Dr. Tobias was a pathologist with the Hamilton County Coroner's Office. He had a legitimate business purpose for taking the photograph of the decedent. The photograph was not used for any commercial purpose and was in the process of being developed for official business purposes at the time it was seized by the police as evidence in a criminal proceeding. The photograph was published by the police as part of the evidence in the criminal trial. Pursuant to Ohio law, the photograph was a public record. **See, Ohio Revised Codes §§313.10 and 149.43**.

Since plaintiffs were deprived of no protected interest, they cannot maintain a claim for procedural due process. In addition, no evidence exists to show that the Hamilton County Coroner's Office had a pattern or practice of making commercial use of photographs of decedents in the morgue. As a result, even if commercial use had been made of this photograph it would have been a random act not giving rise to a claim under procedural due process. **See, Parratt v. Taylor, 451 U.S. 527 (1981).**

2. Plaintiffs Were Not Denied Equal Protection of the Law.

Plaintiffs' Second Amended Complaint alleges a claim for the denial of Plaintiffs' equal protection rights under the Fourteenth Amendment. To support this claim, Plaintiffs allege only that Defendants denied them equal protection of the law. Since plaintiffs allege no protected class or discriminatory conduct, it is assumed plaintiffs' claim is based upon the "class of one" theory identified in **Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000),** wherein the Supreme Court recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

In this case, no evidence exists that plaintiffs have been intentionally treated differently from others similarly situated. On the contrary, the photograph was taken of the body of the decedent anticipatory to an autopsy and for business purposes. The photograph was taken, along with other business photographs, to an outside lab for development. While in a partial state of development at the lab, the negatives were confiscated by the police, along with other negatives, and published as evidence in the criminal trial. No act by Dr. Parrott can conceivably be construed to constitute a violation of plaintiffs' rights to equal protection.

3. Plaintiffs' Right to Privacy Was Not Violated.

______The United States Constitution does not contain any specific guarantee of the right to privacy. **Paul v. Davis, 424 U.S. 693 (1976).** The Supreme Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power. **Id. See, also Roe v. Wade, 410 U.S. 113 (1973).** In **Roe**, the Court pointed out that the personal rights found in the guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in **Palko v. Connecticut, 302 U.S. 319 (1937). Paul v. Davis, supra, at 713**. In **Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998),** the United States Court of Appeals for the Sixth Circuit held that police officers had a constitutionally protected privacy right in the information contained in their personnel files. The Court found that "where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death," the government act is subject to strict scrutiny and will be upheld under the substantive due process component of the Fourteenth Amendment only where it furthers a compelling state interest and is narrowly drawn to further that interest. That holding is consistent with the ruling of the Supreme Court in **Paul v. Davis** that the United States Constitution only protects privacy rights which are "fundamental" or "implicit in the concept of ordered liberty."

In the case at bar, no such fundamental rights are involved.[3] First, it is clear that a §1983 claim is entirely personal to the direct victim and a deceased's civil rights terminate at death. **Claybrook v. Birchwell, 119 F.3d 350 (6th Cir. 2000); Callihan v. Sudimack, 117 F.3d 1420**

[3] This point is further supported by the fact that plaintiffs have made a claim for invasion of privacy in their state court Complaint.

(6th Cir. 1997)(unpublished, see attached). Further, no cause of action may lie under 42 U.S.C. §1983 for emotional distress, loss of a loved one, or any consequent collateral injuries suffered by the victims' family members. **Claybrook v. Birchwell**, **supra**. A deceased retains no right to privacy after his death and privacy rights are personal and may not be asserted by third persons. **Cordell v. Detective Publications**, **419 F.2d 989 (6th Cir. 1969).** In **Young v. That Was the Week that Was, 312 F.Supp. 1337 (USDC N.D. Ohio 1969),** the Court stated:

> These cases are all consistent with the general proposition that the right of privacy is personal and can only be asserted by the individual whose property has been invaded. It does with him and cannot be claimed by his estate. Neither can it be asserted by the anguished or outraged relatives and friends of the subject individual, who may have been disturbed by the disclosure or exploitation.

Based upon the above cases, it is clear that no cause of action can exist for the developing of the photograph of the deceased. The photograph was not used commercially and was taken for a business purpose. Further, the photograph is a public record pursuant to Ohio Revised Code §313.10 and §149.43.

B. DR. PARROTT IS ENTITLED TO QUALIFIED IMMUNITY.

Dr. Parrott did not violate plaintiffs' constitutional rights and did not violate clearly established law**.** He was not present when Dr. Tobias took the single photograph nor did he play any role in the development of the photograph. The evidence is undisputed that taking photographs of decedents' bodies is an integral part of the work of every pathologist in the Coroner's Office, and the photograph of Melton was taken during the ordinary course of those duties. Since Dr. Parrott did not violate any of plaintiffs' constitutional rights and did not violate clearly established law, he is entitled to qualified immunity with respect to all counts in the Complaint.

"Qualified immunity protects government officials against suit for the performance of discretionary functions so long as the conduct in question "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"(Citations omitted.)" **Levin v. Childers, II, 101 F.3d 44 47 (6th Cir. 1996).** As set forth above, Plaintiffs can not establish a violation of their rights to equal protection, privacy or to due process. Further, Plaintiffs cannot establish that Dr. Parrott performed any act which violated those rights.

Plaintiffs bear the burden of demonstrating a violation of a clearly established right. **Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)**. "A determination of whether an official is entitled to qualified immunity focuses on the objective legal reasonableness of the official's action in light of clearly established law. '[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.'" **Barton v. Norrod, 106 F.3d 1289, 1293 (6th Cir. 1997).** "[T]he operation of the 'objective legal reasonableness' standard 'depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified.' **Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 5213 (1987).**" **Cullinan v. Abramson**, **128 F.3d 301, 309 (6th Cir. 1997).** "[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of ***Harlow***. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.' *Id*." Id.

> [I]t is not enough for a plaintiff to allege that a defendant's conduct violated a right that is clearly established in general terms. Instead, 'the right the official is alleged to have violated must have been 'clearly established' in a more particularized ... sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in light of pre-existing law the unlawfulness must be apparent.'

Harbury, 233 F.3d at 610.

With respect to Plaintiffs' claim for a violation of Plaintiffs' equal protection rights, Defendant Parrott is entitled to qualified immunity as Plaintiffs can neither establish that this right was so "clearly established" that a reasonable official would have understood that what he was doing violated that right, **Brennan v. Township of Northville, 78 F.3d 1152 (6th Cir. 1996.)** Whether a right is "clearly established" is to be determined by looking to the specific facts in reference to the particular actions of the defendant official based on the pre-existing law of the United States Supreme Court and the Sixth Circuit. **Anderson v. Creighton, 483 U.S. 635, 640 (1987); Guercio v. Brody, 911 F.2d 1179, 1184-85. (6th Cir. 1990)**.

With respect to Plaintiffs' due process claim, the correct inquiry is not whether it was established that there was a right to recover for conduct that "shocked the conscience", but whether it was clearly established that Defendant Parrott's alleged conduct would have "shocked the conscience." As set forth above, there is no clearly established legal rule that conduct of Parrott or even Tobias such as that alleged by Plaintiffs, which did not invade Plaintiffs' bodily integrity, "shocked the conscience." The right to pursue a constitutional claim for conduct of Defendants as alleged by Plaintiffs was not, therefore, clearly established.

Finally, as noted above, the undisputed facts of record show that Dr. Parrott did not violate Plaintiffs' constitutional right to privacy even if such right was clearly established. In summary, no evidence exists in the record that any of Plaintiffs' constitutional rights were violated or that Dr. Parrott committed any act which violated a clearly established right of the Plaintiffs. As a result, Dr. Parrott is entitled to qualified immunity with respect to all claims of Plaintiffs in the within action.

IV. CONCLUSION.

Based on the foregoing, defendant, Carl L. Parrott, Jr., M.D., individually and in his capacity as Hamilton County Coroner, respectfully requests that this Court grant summary judgment in his favor on all issues.

s/Lawrence E. Barbiere
Lawrence E. Barbiere
Ohio Bar Number: 0027106
Attorney for Defendant, Carl L. Parrott, Jr., M.D.
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
11935 Mason Road, Suite 110
Cincinnati, OH 45249
(513) 583-4200
(513) 583-4203 (fax)
Email: lbarbiere@schroederlaw.com

OF COUNSEL:

Michael E. Maundrell
Ohio Bar Number: 0027110
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
11935 Mason Road, Suite 110
Cincinnati, OH 45249
(513) 583-4200

CERTIFICATE OF SERVICE

I hereby certify that on **January 28th, 2004,** I electronically filed the foregoing with the Clerk of the Court using the CM/ECFF system which will send notification to the following: David W. Kapor, Esq. and Michael B. Ganson, Esq., ***Attorneys for Plaintiffs,*** Jamie M. Ramsey, Esq., ***Attorney for Defendant, Hamilton County***, Glenn V. Whitaker, Esq., ***Attorney for Defendant, Jonathan Tobias***, and Stephen J. Patsfall, Esq., ***Attorney for Defendant, Thomas Condon.***

s/ Lawrence E. Barbiere
Lawrence E. Barbiere